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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260

COMMENTS OF BELL ATLANTIC[1]

I. Introduction and Summary

Exclusive contracts are, by their very nature, anticompetitive, because they prevent competitive entry. In the case of wiring for video services within a multiple dwelling unit building ("MDU"), such contracts are inconsistent with Congressional policy, codified in Title VI of the Act, that the public should be provided "the widest possible diversity of information sources and services."[2] Exclusive contracts, therefore, can be justified only where the lack of exclusivity for a short, interim period, would otherwise deprive the building tenants of

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

[2] 47 U.S.C. §521(4). ***See also*** 47 U.S.C. §548 which requires the Commission to promulgate regulations to promote video service competition.

all video service, because no multichannel video programming distributor ("MVPD") would be willing to wire the building. Any permitted exclusive contracts should be limited in duration to the minimum time needed for the MVPD to recover its wiring costs. Therefore, exclusive contracts should not be allowed when the MVPD does not incur the investment, such as when the landlord or condominium association has financed installation of the wiring.[3] Based on cost recovery information that video providers have submitted to the Commission and that the Commission has found not to be unreasonable, five years should suffice to recover those costs, and any clause in a contract that maintains exclusivity beyond five years should be presumed contrary to the public interest and unenforceable. Similarly, exclusivity clauses in existing contracts should be presumed to be unreasonable on the later of five years after the contracts were made or three years after the effective date of the Commission's rules adopted in this proceeding. These presumptions could be overcome only by a showing that additional time is needed for cost recovery because of extraordinary circumstances.

II. Exclusive Contracts Should Be Limited To The Time Reasonably Needed To Recover Costs.

The Commission has previously observed that policies designed to encourage competition in provision of video services to MDUs will be ineffective if tenants are deprived of the ability to select from among multiple providers of such services.[4] Exclusive contracts

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[3] The Commission acknowledges that exclusive contracts can be anticompetitive but says that they may at other times be pro-competitive. ***Report and Order and Second Further Notice of Proposed Rulemaking***, FCC 97-376, ¶ 258 (rel. Oct. 17, 1997) ("Second Notice") ("Cable Home Wiring Order"). While exclusive contracts may be the only way to make it economically feasible for a single provider to provide video service to an otherwise unserved building, it is difficult to imagine how such contracts could ever encourage competition.

[4] ***Notice of Proposed Rulemaking***, 11 FCC Rcd 2747, ¶ 61 (1996) ("Notice").

between a MVPD and a landlord deprive tenants of a choice of providers and, therefore, are by their very nature inconsistent with the Commission's policies promoting video service competition. As the Commission recognizes, however, if exclusive contracts were entirely prohibited, in some instances tenants could be entirely deprived of video services, because no MVPD might be willing to invest in the wiring within the MDU needed to deliver signals to tenants.[5] This is not the case where the landlord or condominium association, rather than the MVPD, finances the wiring. Similarly, if a MDU owner or landlord buys out the wiring by reimbursing the MVPD for the remaining unamortized investment, exclusivity should immediately terminate. Therefore, the Commission should allow exclusive contracts only in those cases where the MVPD finances installation of the cable inside wire, is not reimbursed by the landlord or condominium association, and then only for the minimum period needed to allow the MVPD to amortize its wiring investment.[6]

The Commission should find that a five-year period is sufficient time for a MVPD to recover its wiring investment, and exclusivity clauses in contracts that extend beyond five years should be found to be inconsistent with the public interest. Five years is consistent with the 4-6 years during which Bell Atlantic, the former NYNEX, and Pacific Bell proposed to recover their investment in their entire video networks, which involved much more extensive, costly, and complex construction than inside wiring within a single building. In approving the application for each of the systems, the Commission found such an amortization period "not

[5] Second Notice at ¶ 258.

[6] ***See id.*** at ¶ 259. Limitations on exclusive contracts should not be limited to cases where the MVPD possesses market power in the community, as the Commission suggests. ***See id.*** at ¶¶260-61. A MVPD that has an exclusive contract to provide service to an MDU possesses market power within that MDU, because it has the contractual right to block competitive entry.

unreasonable."[7] In addition, as it notes,[8] the Commission has raised concerns in the collocation proceeding about contracts that lock customers into access arrangements that exceed three years, far less than the five years proposed here.[9]

A MVPD should be given the opportunity to rebut the presumption that an exclusivity clause that extends beyond five years is unreasonable. To do so, the MVPD would need to show extraordinary circumstances that require a longer period for cost recovery. Any extension beyond five years should be limited to the minimum period needed to allow the MVPD to recover its wiring costs.

Just as the Commission should generally not permit new contracts with exclusivity clauses that extend beyond five years, it should also find unreasonable exclusivity clauses in existing perpetual and long-term contracts that extend beyond the later of five years from the date when they were originally entered into or three years from the effective date of the rules adopted in this proceeding, barring a showing of unusual circumstances.[10] This will give time for the MVPD to adjust its rates to ensure full cost recovery.

The Commission should not, however, adopt a fresh look period for video inside wire contracts, as it suggests.[11] Unlike long-term access arrangements such as collocation, each

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[7] ***See New Jersey Bell Telephone Company***, 9 FCC Rcd 3677, 3684-85 (1994) (4-6 years); ***Pacific Bell***, 60 RR 2d 1175, 1180 (CCB 1986) (4 years); ***New England Telephone and Telegraph Company***, 10 FCC Rcd 5346, 5383-85 (1995) (4-6 years).

[8] Second Notice at n.566.

[9] ***Expanded Interconnection with Local Telephone Company Facilities***, 7 FCC Rcd 7369, 7463-64 (1992) (such contracts are subject to a "fresh look" period during which they may be canceled with limited termination liability).

[10] Exclusivity clauses in contracts where the MVPD has not incurred inside wiring investment should not be enforceable at all.

[11] Second Notice at ¶¶ 264-65.

of which involves a single customer, the presence or absence of video competition within a MDU affects all tenants. If fresh look were adopted for MDU video wiring, the landlord would be given a brief window during which it must decide whether or not to cancel an exclusive contract and provide its tenants with competitive choices. Once the window closes, the exclusive contract remains, even though the wiring investment has been fully recovered. The landlord and tenants would be powerless, during the remaining contract term, to permit competitive entry, even if providers with more attractive services or lower pricing were to enter the market. Their interests would be better served by giving the landlord the right to allow such entry at any time once the wiring is paid for.

III. The Commission Has the Authority to Bar Cable Operators From Entering Into Exclusive Contracts and To Cancel Existing Exclusive Contracts.

The Communications Act provides the Commission with ample authority to limit the duration of exclusivity clauses in cable operators' contracts. In Title IV, Congress has declared as a federal policy the need to "increas[e] competition and diversity in the multichannel video programming market."[12] Exclusive contracts between cable operators and MDU owners that eliminate a tenant's ability to obtain service from providers other than the operators selected by the landlord would be inconsistent with this provision, unless, as appears to be the case, permitting them for a short, finite period will prevent tenants from being entirely deprived of service. Accordingly, under Title VI, the Commission is authorized to adopt regulations which limit the term of exclusivity clauses in new and existing contracts.

[12] 47 U.S.C. § 548(c)(1).

The Commission's proposal is in furtherance of the policy and scope of authority that Congress granted in Title VI of the Act. Under Title I, the Commission's authority extends to any regulation that is "reasonably ancillary to the effective performance of [the Commission's] various responsibilities" under another title of the Act.[13] The Commission has already found that it had "ancillary" jurisdiction to issue its current cable home wiring rules[14] and cited this same statutory authority as the basis for considering uniform inside wiring rules in its earlier notice in this proceeding.[15]

As discussed above, such a rule is essential to ensure that MDU residents have access to competitive video services. Such a prohibition also would be consistent with the Commission's approach in other contexts in which it has restricted communications providers from entering into exclusive contracts when necessary to increase competition and enhance consumer choice in a communications market.[16]

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[13] ***United States v. Southwestern Cable Co.***, 392 U.S. 157, 178 (1968); ***see also, F.C.C. v. Midwest Video Corp.***, 440 U.S. 689 (1979); ***United States v. Midwest Video Corp.***, 406 U.S. 649 (1972).

[14] ***See Detariffing the Installation and Maintenance of Inside Wiring***, CC Docket No. 79-105, ***Final Rule and Summary of Report and Order***, 51 FR 8498 (rel. Mar. 12, 1986) (requiring telephone carriers to relinquish ownership of inside wire); ***Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network***, 5 FCC Rcd 4686, 4691-4693, 4702-4703 (1990) (setting telephone demarcation point); Cable Home Wiring Order, at 1439, 1443 (setting cable demarcation point).

[15] ***See*** Notice at ¶ 80.

[16] ***See Implementation of the Cable Television Consumer Protection Act of 1992: Broadcast Signal Carriage Issues***, 8 FCC Rcd 2965 (1993) (prohibiting exclusive retransmission consent arrangements between cable operators and broadcasters); ***Implementation of the Cable Television Consumer Protection Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage***, 8 FCC Rcd 3359 (1993) (prohibiting exclusive contracts between cable operators and satellite programmers); 47 C.F.R. § 63.14 (prohibiting carriers authorized to provide international communications service from entering into exclusive affiliation agreements with foreign carriers or administrations); 47 C.F.R.

This result does not change because, in this case, the rule may incidentally affect MDU building owners, in addition to telecommunications service providers whom the Commission may directly regulate. *Any* decision by the Commission to regulate a communications provider will incidentally affect third parties -- the provider's existing or potential customers. Beyond that, the Commission has directly forbidden contracts between regulated communications providers and unregulated parties in the past, despite the effects on private property owners.[17]

Nor are there any constitutional obstacles to prohibiting such exclusive contracts. In ***Loretto v. Teleprompter Manhattan CATV Corp.***, 458 U.S. 419 (1982), the Supreme Court struck down a New York statute that required landlords to permit cable operators to install wiring in their buildings on the theory that even a small physical occupation of property without just compensation violates the Taking Clause. Unlike the statute in ***Loretto***, however, rules proscribing exclusive contracts would create no physical occupation because they would not *compel* property owners to provide access to competing cable providers.[18] The building owner could decide, in each instance, whether or not to permit a new provider into the building, but that

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§§ 73.132, 73.232 (prohibiting exclusive arrangements between broadcast station licensees and network organizations in a particular territory).

[17] For example, the Commission has prohibited contracts that afford exclusive use of antenna sites by television licensees if such use restricts the number of television stations in a particular area or unduly restricts competition among television stations in that area. ***See*** 47 C.F.R. § 73.635; ***see also*** 47 C.F.R. § 73.239. Where the television licensee leases a site, this prohibition has the incidental effect of precluding private site owners from entering into exclusive lease arrangements and could require the site owner to admit a second television licensee whenever it admits the first licensee.

[18] Such rules would not raise the concerns voiced by building owners in the earlier phase of this proceeding, because the Commission would neither be exercising jurisdiction over building owners and managers nor mandating access to or occupation of their buildings by telecommunications providers. *See* Joint Comments of Building Owners and Managers Assn. Intl. et al., at 2-5 (filed Mar. 18, 1996).

decision would not be encumbered by an exclusive contract with the incumbent. Although the rules would prevent *service providers*, over whom the Commission undeniably has jurisdiction, from entering into arrangements that exclude competitors from MDU buildings, the Takings Clause does not protect any party's purported right to exclude others from *someone else's* property.[19]

Moreover, neither the Due Process Clause nor the Contracts Clause gives communications providers an absolute right to enter into exclusive contracts or enforce exclusivity provisions. First, the Due Process Clause does not "guarantee the unrestricted privilege to engage in business or to conduct it as one pleases."[20] Due process demands only that regulations restricting freedom of contract "not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."[21] This is true even where the regulation "upsets otherwise settled expectations."[22] Rules prohibiting exclusive contracts easily would withstand this scrutiny; they are a rational and reasonable means to remove roadblocks to competition and thereby promote the objectives of the Act. Second, the Contracts Clause applies only to restrictions imposed by the states.[23]

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[19] ***See Loretto***, 458 U.S. at 436 (the Takings Clause protects "an owner's expectation that he will be relatively undisturbed at least in the possession of his property").

[20] ***Nebbia v. People of the State of New York***, 291 U.S. 502, 527-28 (1934).

[21] ***Id.*** at 525; ***PruneYard Shopping Center v. Robins***, 447 U.S. 74, 85 (1980).

[22] ***Usery v. Turner Elkhorn Mining Co***., 428 U.S. 1, 16 (1976).

[23] ***See*** U.S. Constitution, Art. 1, § 10 ("No State shall.. pass any...law...impairing the Obligation of Contracts") (emphasis added); ***Pension Benefit Guarantee Corp. v. R.A. Gray & Co.***, 467 U.S. 717, 733 n. 9 (1984) ("It could not be justifiably claimed that the Contract Clause applies, either by its terms or by convincing historical evidence, to actions of the National Government.").

IV. Conclusion

Accordingly, the Commission should declare that cable inside wire contracts may provide exclusivity for no more than five years when the wiring is financed by a MVPD, and may be not enforced when the landlord finances the wiring.

Respectfully Submitted,

The Bell Atlantic Telephone Companies

By their Attorney

Lawrence W. Katz

1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201
(703) 974-4862

Betsy L. Roe
Michael E. Glover
Of Counsel

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